Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD L. SIMPSON AND RODOLFO MOLINA, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, to establish a violation of the drug conspiracy statute, 21 U.S.C. 846, the government must prove an overt act in furtherance of the conspiracy.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 10 F.3d 645.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be sub-

ject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, respondents Donald L. Simpson and Rodolfo Molina, Jr., were convicted of conspiring to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. Simpson also was convicted of possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d). Simpson was sentenced to life imprisonment. Molina was sentenced to 365 months' imprisonment, to be followed by five years' supervised release. The court of appeals reversed respondents' conspiracy convictions but affirmed Simpson's firearm conviction. App., *infra*, 1a-10a.

1. From August 1990 through April 1991, respondents devised and began implementing a plan to bring 500 kilograms of cocaine from Mexico into the United States for sale in this country. Simpson, a former U.S. Customs Inspector, struck up an acquaintance with John Frasure while the two were inmates at the U.S. Medical Facility for Federal Prisoners in Springfield, Missouri. In conversations with Frasure, Simpson said that he was under indictment for his complicity in a large cocaine seizure in Arizona and described the details of the crime.[1] Just before Frasure was released, Simpson proposed that Frasure come to Arizona to help Simpson with his drug trafficking activities. 92-10155 Gov't C.A. Br. 4.

After Frasure was released, he received a telephone message from Simpson. Frasure contacted the FBI and

[1] Simpson was also a respondent in *United States* v. *Padilla*, 113 S. Ct. 1936 (1993).

related his prior conversations with Simpson. Under FBI supervision, Frasure flew to Tucson, Arizona, posing as an agent for racketeers interested in purchasing 500 kilograms of cocaine. Simpson met Frasure at the Tucson airport on November 27, 1990, and the two made preliminary plans for the 500-kilogram purchase. 92-10155 Gov't C.A. Br. 4-5.

On December 7, 1990, Frasure met with Simpson and Molina (a former employee of the Immigration and Naturalization Service) to continue planning the 500-kilogram purchase. At a third meeting, on January 3, 1991, Simpson and Molina introduced Frasure to their source of cocaine in Mexico, a man named "Luis." Luis assured them that he could supply 500 kilograms of cocaine. On January 28, 1991, while under FBI surveillance, Molina delivered a sample of the cocaine to Frasure at a truck stop near Cordes Junction, Arizona. On February 23, 1991, Simpson telephoned Frasure and said that the cocaine was ready to be delivered. 92-10155 Gov't C.A. Br. 6-7; 92-10158 C.A. Excerpt of Record 52.

Before the cocaine was delivered, federal agents executed a search warrant at Simpson's residence near McNeal, Arizona. The agents seized scores of firearms and ammunition. Among the firearms was an SGW .223 caliber rifle that had been modified to fire in a fully automatic mode. 92-10155 Gov't C.A. Br. 7-8.

2. A federal grand jury in the District of Arizona returned a four-count indictment against Simpson, Molina, and two co-defendants. The indictment charged all four defendants with conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); it charged all four defendants with the distribution of cocaine on or about January 28, 1991, near Cordes Junction (Count 2); it charged Simpson with possessing a firearm during and in relation to a drug trafficking crime (Count 3); and it

charged Simpson with possessing an unregistered SGW rifle, in violation of 26 U.S.C. 5861(d) (Count 4). 92-10155 C.A. Excerpts of Record Tab 2.

At trial, respondents asked the district court to instruct the jury that, in order to find them guilty of the conspiracy charge, it had to find that an overt act in furtherance of the conspiracy had been committed. 92-10155 C.A. Excerpts of Record Tab 7, at 5; *id.* Tab 10, at 9; 92-10158 C.A. Excerpt of Record 15. The court refused to give such an instruction. 92-10155 C.A. Excerpts of Record Tabs 11, 13.

The jury found Simpson and Molina guilty of the conspiracy charge (Count 1) and also found Simpson guilty of the firearm charge in Count 4. The jury found them not guilty on the other charges.

3. The Ninth Circuit reversed respondents' conspiracy convictions on the basis of *United States* v. *Shabani*, 993 F.2d 1419 (9th Cir. 1993), cert. granted, No. 93-981 (Feb. 22, 1994). Relying on *Shabani*, the court of appeals held that the district court erred by failing to instruct the jury that, to establish a violation of the drug conspiracy statute (21 U.S.C. 846), the government was required to prove an overt act in furtherance of the conspiracy. App., *infra*, 2a. The court of appeals further held that the error was not harmless, because the jury need not have found that Simpson or Molina engaged in any overt acts in finding them guilty of the conspiracy. *Id.* at 4a. In connection with the latter holding, the court observed that the jury acquitted respondents on Count 2, "the only substantive [drug] offense with which they were charged." *Id.* at 3a-4a.[2]

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[2] In rulings that are not at issue in this petition, the court of appeals rejected Simpson's challenges to his firearm conviction. Simpson argued that the automatic rifle on which the firearm

REASONS FOR GRANTING THE PETITION

This case presents the same issue as *United States* v. *Shabani*, cert. granted, No. 93-981 (Feb. 22, 1994).[3] Here, as in *Shabani*, the Ninth Circuit held that in a prosecution under the drug conspiracy statute, 21 U.S.C. 846, the government must prove that an overt act in furtherance of the conspiracy was committed. App., *infra*, 2a. That holding, as the Ninth Circuit recognized in *Shabani*, 993 F.2d 1419, 1421 & n.1 (1993), conflicts with the decisions of every other circuit with criminal jurisdiction. Moreover, as we have explained in our petition in *Shabani* (at 5-9), the Ninth Circuit's holding conflicts with the language of Section 846, which contains no overt act requirement, and with this Court's decisions in *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913), which make clear that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act.

The Court's decision in *Shabani* would affect the outcome of this case. The Court should therefore hold the

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charge was based should have been suppressed because it was seized in violation of the Fourth Amendment. The court held that the seizure was justified under the "plain view" doctrine. App., *infra*, 7a. Simpson also argued that the jury instructions on the firearm charge were erroneous, because they misstated the *scienter* requirement for a violation of 26 U.S.C. 5861(d). The court rejected that argument, holding that the instructions properly instructed the jury that it "had to find that Simpson knew he was dealing with 'a dangerous device of such type as would alert one to the likelihood of [a registration requirement].'" App., *infra*, 9a (quoting *United States* v. *O'Mara*, 963 F.2d 1288, 1290 (9th Cir. 1992)).

[3] We have furnished counsel for respondent with a copy of our certiorari petition in *Shabani*.

petition in this case and then dispose of it as appropriate in light of its decision in *United States* v. *Shabani*, No. 93-981.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *United States* v. *Shabani*.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1994

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-10155

D.C. No. CR 91-253-TUC-WDB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DONALD LAKE SIMPSON, DEFENDANT-APPELLANT

No. 92-10158

D.C. No. CR 91-253-TUC-WDB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RODOLFO MOLINA, JR., DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

William D. Browning, District Judge, Presiding

Argued and Submitted

August 9, 1991 - San Francisco, California

Filed November 30, 1993

OPINION

Before: STEPHEN REINHARDT and EDWARD LEAVY, Circuit Judges, and ROBERT R. MERHIGE*, Senior District Judge

LEAVY, Circuit Judge

Donald Lake Simpson (Simpson) and Rodolfo Molina, Jr. (Molina) appeal their convictions and sentences for conspiracy to distribute and to possess with intent to distribute 5 kilograms or more of cocaine in violation of 28 U.S.C. § 846. Simpson also appeals his conviction and sentence for possession of an unregistered firearm in violation of 26 U.S.C. §§ 5861(d) and 5871.

I. *Conspiracy: Failure to Instruct on Overt Act*

With regard to the conspiracy charge against both defendants, the issue presented is whether 21 U.S.C. § 846 requires an allegation in the indictment of an overt act and whether the jury must be instructed that proof of an overt act is required. While the indictment need not contain an allegation of an overt act, proof of such an act is required. *United States v. Shabani*, 993 F.2d 1419 (9th Cir. 1993); *see also United States v. McCown*, 711 F.2d 1441 (9th Cir.

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

1983); *United States v. Tavelman*, 650 F.2d 1133 (9th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

In Molina's case, the government contends that the failure to instruct was harmless in view of Jury Instruction Nos. 10-15 and Molina's defense that his overt acts were done for an innocent purpose. In *Shabani*, we wrote:

> The jurors heard testimony about overt acts. Witnesses said that Shabani drove a truck at least twice to accept drug deliveries. But the jurors did not necessarily have to rely on this evidence to convict of conspiracy as defined in the jury instructions.
>
> We decline to speculate about how the jury might have weighed this evidence if properly instructed. As a result, we cannot say that the instructional error was harmless. To find harmless error, we would have to conclude that "no rational jury could have made [its] findings without also finding the omitted or presumed fact to be true." *We have deemed omission of the overt act element harmless where the jury's determination of guilt on another substantive count served as the functional equivalent of a finding of an overt act.*[1]

Id. at 1422 (Citation omitted; emphasis added.)

Both defendants were acquitted of count II of the indictment charging them with distribution of less than 500 grams of cocaine. This was the only sub-

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[1] See *United States v. Garcia*, 988 F.2d 965 (9th Cir. 1993); *United States v. Baldwin*, 987 F.2d 1432, 1438-39 (9th Cir.), *cert. denied*, 113 S. Ct. 2948 (1993), *United States v. Harrison-Philpot*, 978 F.2d 1520, 1522 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2392 (1993).

stantive offense with which they were charged. Even if Molina admitted to certain overt acts, the jury need not have relied on those acts to convict him. As in *Shabani*, we cannot say that the instructional error was harmless. Simpson's and Molina's conspiracy convictions are therefore REVERSED.

II. *Search and Seizure: Plain View*

Simpson contends his conviction for possession of an unregistered firearm—a SGW 5.56 caliber (AR-15) rifle modified to fire in a fully automatic mode—must be reversed because the rifle was first illegally seized, then illegally searched.

Simpson argues the seizure of the rifle exceeded the scope of the search warrant because the warrant did not mention firearms, but instead listed documentary evidence of a narcotics trafficking conspiracy. The Government contends that, under the plain view doctrine, given the breadth of this drug conspiracy and prior conspiracies in which Simpson was involved,[2] the warrant is broad enough to encompass such "drug-related evidence" as the rifle.

For the plain view doctrine to apply, two criteria must be met: the initial intrusion must be lawful and the incriminatory nature of the evidence must be immediately apparent to the officers. *Horton v. California*, 110 S. Ct. 2301 (1990). Simpson does not argue that the initial intrusion was unlawful. As to the second criterion, the warrant encompasses "[i]tems evidencing financial transactions in furtherance of . . . trafficking in controlled substances." According to the return, the "AR-15 (Olympic Arms)" rifle at issue was found "standing next to bed and nightstand

[2] See *United States v. Padilla*, 960 F.2d 854 (9th Cir. 1992), *rev'd and remanded*, 113 S. Ct. 1936, *on remand*, 993 F.2d 721 (9th Cir. 1993).

on north wall of bedroom with fully loaded magazine and 1 round in the chamber." We have held that "evidence in plain view may be seized when the executing officers have 'probable cause' to believe that a nexus existed between the viewed item and criminal activity." *United States v. Washington*, 797 F.2d 1461, 1469 (9th Cir. 1986). Because of the close relationship between drugs and firearms in the narcotics trade, *see United States v. Savinovich*, 845 F.2d 834, 837 (9th Cir.), *cert. denied*, 488 U.S. 943 (1988), the plain view seizure of firearms as evidence of narcotics offenses has been supported even when firearms are not specifically named in the search warrant. *See United States v. Matthews*, 942 F.2d 779 (10th Cir. 1991); *United States v. Smith*, 918 F.2d 1501 (11th Cir. 1990), *cert. denied sub nom., Hicks v. United States*, 112 S. Ct. 151 (1991); *United States v. Caggiano*, 899 F.2d 99 (1st Cir. 1990). Here, it was reasonable for the investigating officers to infer that the AR-15 rifle was incriminating evidence of a narcotics offense. The fact that Simpson was charged with a firearms offense as a result of the seizure does not alter our analysis. *See Matthews*, 942 F.2d 779 (10th Cir. 1991); *Caggiano*, 899 F.2d 99 (1st Cir. 1990); *Smith*, 918 F.2d 1501 (11th Cir. 1990).

Simpson argues the rifle was illegally searched by manipulation of the selector switch, dry firing, internal examination, and test firing. He contends a visual examination of the rifle, which was internally modified, did not suggest that the rifle was an automatic weapon. Thus, it was neither "immediate" nor "apparent" that the rifle was prohibited under 26 U.S.C. § 5861(d) and the search of the rifle was unlawful.

In support of his position, Simpson relies on *United States v. Szymkowiak*, 727 F.2d 95 (6th Cir. 1984). In

that case, while searching Szymkowiak's apartment pursuant to a valid search warrant for specified items of jewelry and a television set, officers inadvertently found a Colt AR-15 rifle. Unbeknownst to the officers, the rifle had been converted from semiautomatic to full-automatic. To determine whether such a conversion had occurred, an agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF) was asked to come to the site of the search and examine the weapon. The ATF agent stated he could not determine without disassembling the firearms whether they had been illegally adapted for fully automatic performance. However, upon the agent's recommendation, the rifle was seized. In his prosecution for unlawful possession of an unregistered weapon, Szymkowiak moved to suppress the AR-15. The district court denied his motion. The Sixth Circuit reversed, reasoning that, at the time of the seizure, the officers had no reason to believe that the weapon had been converted to full-automatic; thus, the incriminating nature of the rifle was neither immediate nor apparent.

In *Szymkowiak*, the officers lacked probable cause to seize Szymkowiak's weapon because "no 'nexus' whatsoever exist[ed] between the seized weapon and the items particularized in the search warrant." *Id.* at 98. Here, officers reasonably believed a nexus existed between the rifle and narcotics trafficking activities. Once in their possession, the officers were entitled to unload the weapon as a safety precaution. *See United States v. Humphrey*, 759 F.2d 743, 748 (9th Cir. 1985) (limited, protective search for and temporary seizure of guns was justified by security considerations), *cert. denied*, 480 U.S. 917 (1987); *United States v. Pillow*, 842 F.2d 1001, 1004 (8th Cir. 1988) (gun that was in plain view was subject to seizure as a reasonable safety precaution); *United*

States v. Malachesen, 597 F.2d 1232, 1234-35 (8th Cir.) (temporary seizure and unloading of weapon which did not immediately appear to be incriminating upheld as reasonable safety precaution), *cert. denied*, 444 U.S. 902 (1979). We hold that once officers, lawfully present in Simpson's residence and searching for evidence of a drug trafficking operation, legally seized the rifle and lawfully unloaded the weapon as a safety precaution, Simpson no longer had a reasonable expectation of privacy in the internal mechanisms of the rifle sufficient to prevent officers from lawfully searching that weapon by means of manipulation of the selector switch, dry firing, internal examination, and test firing. Accordingly, the district court did not err in denying Simpson's motion to suppress.

III. *Scienter Requirement Under 26 U.S.C. § 5861(d)*

Simpson also argues the district court erred in refusing his proposed Jury Instruction No. 12 because section 5861(d) contains a scienter element. Proposed Jury Instruction No. 12 reads:

> It is not enough for the Government to prove that Mr. Simpson knowingly possessed a gun. In order to prove a violation of 26 U.S.C. § 5861(d), the government must prove, beyond a reasonable doubt, that the defendant possessed a weapon which he knew was a machinegun as defined by the statute.

The government argues that Instruction No. 25, together with Instruction No. 26 defining the term "machine gun," and Instruction No. 27 defining the "knowing" doing of an act were sufficient. Instruction No. 25 reads:

> In order for the defendant to be found guilty of possession of an unregistered firearm in violation of Section 5861(d) of Title 26 of the United States Code, as charged in Count 4 of the indictment, the government must prove the following elements:
>
> First, the defendant knowingly received or possessed a machinegun;
>
> Second, the machinegun was not registered to the defendant in the National Firearms Registration and Transfer Record.

We review the issue of whether a jury instruction misstates elements of a statutory crime *de novo*. *United States v. Johnson*, 956 F.2d 197, 199 (9th Cir. 1992). The district court's denial of a proposed jury instruction is also reviewed *de novo*. *See United States v. Streit*, 962 F.2d 894, 897 (9th Cir.), *cert. denied*, 113 S. Ct. 431 (1992).

In support of his argument that the district court's instructions were insufficient, Simpson relies upon *United States v. O'Mara*, 963 F.2d 1288 (9th Cir. 1992). In that case, we stated:

> Where "there was no external indications on the weapon that indicate it is subject to regulation," the district court must *expressly instruct* the jury that the government must prove the defendant "knows that he is dealing with a dangerous device of such a type as would alert one to a likelihood of regulation."

Id. at 1290 (quoting *Herbert*, 698 F.2d at 986). This statement was based, in part, on our decision in *United States v. Herbert*, 698 F.2d 981 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983), another case upon which Simpson relies.

In *Herbert*, the district court gave an instruction similar to Jury Instruction No. 25 in that it set forth the elements of the crime of illegal possession or transfer of an unregistered weapon as "(1) knowing possession [or transfer] of a machine gun and (2) that such machine gun was unregistered." *Id.* at 986. However, unlike Simpson, Herbert did not object to this instruction: Rather, he objected to the district court's further instruction that

> [t]he mere possession, transfer or making of a firearm which is required to be registered and has not been is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon was a firearm within the meaning of the statute or that he knew that registration was required. It is sufficient if you find beyond reasonable doubt that he knowingly possessed, transferred and/or made it.

Id. We found this instruction insufficient, reasoning that "[i]f the law was as stated in this instruction, then any person who possessed an internally modified weapon with absolutely no knowledge or method of verification of the modification would be in violation of the law." *Id.* at 986-87.

Unlike the instructions in *Herbert*, the instructions here required that the jury find Simpson "knowingly received or possessed" a machine gun, which it defined as a "weapon which shoots, is designed to shoot, or can be readily restored to shoot automatically more than one shot, without manual reloading, by a single function of the trigger." Thus, the jury had to find that Simpson knew he was dealing with "a dangerous device of such type as would alert one to the likelihood of regulation." *O'Mara*, 963 F.2d

at 1290 (quoting *Herbert*, 698 F.2d at 986). The district court did not err in rejecting Simpson's proposed Jury Instruction No. 12 nor in giving Jury Instruction Nos. 25-27.

CONCLUSION

Simpson's and Molina's conspiracy convictions are REVERSED and REMANDED for a new trial. Simpson's firearms conviction is AFFIRMED.